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ABSTRACT

The press and public should have access to pretrial discovery documents in civil litigation when matters of public concern are at issue. Recently, the Supreme Court expanded the public's First Amendment right of access to criminal proceedings, and based on that, some lower courts have granted access to civil trials. In its decisions establishing public right of access to criminal court proceedings, the Supreme Court established that (1) the requested right of access must be rooted in judicial history, and (2) access must serve important public interests, particularly the opportunity for the public to assess how well the judicial system functions. Access to civil discovery documents meets both these criteria, and therefore the public and press should have a First Amendment right to examine such material. Courts refusing access to pretrial discovery documents have relied on the Supreme Court's opinion in "Seattle Times Co. v. Rhinehart." "Rhinehart" arose from an action for defamation and invasion of privacy filed by the head of a "spiritualist church." But "Rhinehart" is inapplicable to most cases in which access has been sought. Several courts have recognized that public interest demands access in certain cases, and this view should be adopted widely. Continued secrecy prevents the press and public from learning about matters which may affect them directly. (Six pages of footnotes are included.) (AEW)

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MEDIA ACCESS TO PRETRIAL DISCOVERY DOCUMENTS: BEYOND REACH?

By

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THE MEDIA'S ACCESS TO PRETRIAL DISCOVERY DOCUMENTS: BEYOND REACH?

The Supreme Court of the United States has held that the press and public have a First Amendment right to attend criminal trials,[1] pretrial hearings[2] and voire dire proceedings.[3] Other courts have granted access to civil proceedings.[4] However, the media have been unsuccessful in gaining access to documents exchanged during pretrial discovery in civil litigation involving issues of public interest when those documents have not been used by the parties in open court or as support for pretrial motions. This frequently occurs when litigation is settled before or during trial. Courts generally have held that such discovery documents are not part of the public aspects of civil litigation. They have refused to apply to discovery documents the rationales supporting the opening of criminal and civil proceedings,[5] and thus have prevented media access to material the press claims should be available to the public.

These court decisions are wrong. The press and public should have access to discovery documents in civil litigation when matters of public concern[6] are at issue. Case law, English and American judicial practice, the adoption of the Federal Rules of Civil Procedure and First Amendment values combine to require such access.

The Issue: After a civil lawsuit is initiated by the filing and serving of a complaint, the Federal Rules of Civil Procedure and analogous state rules[7] permit parties to engage in pretrial discovery of "any matter, not privileged, which relates to the subject matter involved in the pending action . . . [which] appears reasonably calculated to lead to the discovery of admissible evidence."[8] Discovery involves, among other procedures, the taking of depositions,[9] the submission to parties[10] of interrogatories and the production of documents.[11] This paper is concerned with public access to documents exchanged between parties as part of the discovery process in civil litigation involving matters of public concern.[12] This paper contends that the public interest requires that information

from such documents be disseminated to the public. Realistically, this may be accomplished only through the mass media which, acting as the public's surrogate, should have access to pretrial discovery documents.

Any party may serve a request upon any other party to produce and to permit the inspection and copying of documents and other tangible things that are in the party's possession or control.[13] Within 30 days,[14] the party served with the request shall serve a written response agreeing to produce the material requested or stating reasons for objecting to the request.[15]

Any party also may ask the court to issue a protective order which, among other stipulations, can forbid anyone with access to discovery documents to reveal their contents or grant access to them to anyone but the requesting or producing party.[16] The moving party must show "good cause" for the protective order. Specifically, an order is to be issued only to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ."[17]

Under current case law, the press and the public have no right of access to any discovery documents protected by such an order.[18] Nor is there a right of access in the absence of a protective order if no party voluntarily agrees to permit access.[19] Some courts have allowed access if the documents were used by the court, for example, in ruling on a motion offered by a party.[20] However, if the documents are exchanged during discovery, are not utilized by the court and the civil litigation is settled without trial, courts nearly always refuse press requests for access. In several cases highly charged with public interest, documents have remained secret, depriving the public of learning possibly important information.

For example, in Oklahoma Hospital Association v. The Oklahoma Publishing Company,[21] the Oklahoma Department of Human Services ("DHS") changed the methodology by which it reimbursed hospitals for inpatient hospital services provided under the Oklahoma Medical Assistance program. The Oklahoma Hospital Association

and certain of its members ("Hospitals") sued DHS challenging the new methodology and seeking an order requiring DHS to use a different reimbursement formula which would result in payments of $16 million more than DHS had proposed. After DHS filed a document request, the Hospitals moved for a protective order prohibiting public dissemination of any material produced in discovery and proposed that all material not introduced in open court be returned to the originating party or destroyed upon completion of the litigation. DHS followed with a similar motion. Shortly thereafter, the Hospitals and DHS proposed a settlement, under which DHS would reimburse the Hospitals at a level approximately $8 million greater than DHS initially had proposed. Under the terms of the protective orders, the documents were to be destroyed or returned to the party producing them. However, a reporter for The Daily Oklahoman, a newspaper in Oklahoma City, had learned of a deposition taken in connection with the litigation in which a DHS investigator alleged that the Hospitals factored into the costs for which they asked Medicaid reimbursement such items as "condominiums . . . [and] expensive food items being air freighted in from time to time on a regular basis," "a surfer package for an individual to Waikiki Beach" and "expenditures for what [the investigator] . . . considered to be unusual foodstuffs . . . ."[22] The newspaper sought access to the discovery documents, arguing that the documents could reveal whether or not the Hospitals impermissibly attempted to recover for such expenses. The newspaper moved to vacate the protective orders that were imposed at the inception of discovery, noting that a DHS representative said that the documents would be made available if the orders were removed.

The Tenth Circuit held that the newspaper lacked standing to seek access,[23] and also stated that the Supreme Court's decision in Seattle Times Co. v. Rhinehart[24] was otherwise dispositive. Rhinehart, according to the court, concluded that there is no public right of access to pretrial discovery documents.[25] In part, the Oklahoma

Publishing court held, the Hospital's documents "had not been filed with the court . . . [and] therefore were not accountable to the public generally . . . ."[26]

The press also was blocked from seeing pretrial discovery documents in Anderson v. Cryovac Inc.,[27] a case involving allegations that W. R. Grace & Co. and others contaminated a city's drinking water and caused harm to the plaintiffs. The trial court issued a protective order after more than three years of discovery. The order prohibited the parties from making public any information gleaned from pretrial discovery documents.[28] The trial court allowed The Boston Globe to intervene, but denied it access to the protected information. The underlying case ultimately was settled.

The First Circuit did not question the Globe's right to intervene, and thus reached the constitutional questions involved. It recognized that Rhinehart stated that there are First Amendment implications when a court protects discovery documents, but also stated that Rhinehart "has foreclosed any claim of an absolute public right of access to discovery materials."[29] Since the trial court had articulated "good cause" for issuing a protective order, the First Circuit held, it also was justified in not allowing access to the discovery documents.

Access to Judicial Proceedings: Any finding that the press and public have a right of access to pretrial discovery documents must flow from the Supreme Court's opening of judicial proceedings. In the last several years, the Court has expanded the public's First Amendment right of access to criminal proceedings, and based on that some lower courts have granted access to civil trials.

In 1980, one year after ruling that pretrial hearings in criminal cases could be closed,[30] the Supreme Court held that criminal trials must be open to the press and the public.[31] Only a clearly articulated finding that closure is required to protect an "overriding interest" outweighing the public's interest in access would permit closing the courtroom. Two years later, the Court invalidated a Massachusetts law requiring closure

of criminal trials during the testimony of minor sex-crime victims.[32] While recognizing the interest in protecting young victims of sexual crimes from appearing at public trials, the Court held that closures in each case must be justified as narrowly tailored to protect the state's interest without infringing on First Amendment rights.[33]

The Court extended First Amendment access rights to voir dire proceedings in criminal cases, establishing a standard for closure:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.[34]

It then made clear that this test also applied to suppression hearings in criminal cases.[35] Most recently, the Court ruled that the public and press have a First Amendment right of access to transcripts of a preliminary hearing in a criminal matter.[36]

Building on Supreme Court cases, the Ninth Circuit in Associated Press v. United States[37] held that the First Amendment gives the public and press access to documents in a criminal proceeding, even if they have not been used by the court. The court found no reason to distinguish between pretrial proceedings in criminal cases, which the court regarded as presumptively open, and the documents pertaining to them. Several lower courts have found a constitutional right of access to civil proceedings,[38] although the Supreme Court has not yet done so.[39] For example, the Third Circuit stated that a "public right of access to civil trials is . . . inherent in the nature of our democratic form of government."[40]

The trend is toward access to criminal court proceedings and documents, as well as to civil proceedings. However, this approach has not yet opened civil discovery documents to the public and press.

The Test for Access: Some courts have allowed access to discovery documents that were used in court proceedings. For example, the First Circuit ruled that the First Amendment guarantees the public access to civil discovery documents, although it would allow parties to claim confidentiality based on a lesser standard of proof than the test for closing a proceeding.[41] Applying a different standard, the Second Circuit upheld access to civil filings, ruling that "documents used by parties moving for, or opposing summary judgment should not remain under seal absent the most compelling reasons."[42]

The Sixth Circuit, in lifting an order sealing documents submitted during pretrial proceedings in a civil case, ruled that principles applicable to public access to the courtroom also apply to "access to information contained in court documents because court records often provide important, sometimes the only, bases or explanations for a court's decision."[43] The Seventh Circuit also has held that a presumption of access applies to any documents "the judge should have considered or relied upon."[44]

At least one court has gone a step further, stating that all "discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings."[45] This conclusion, while rejected by many courts, is defensible. However, its confirmation must be based upon examination of the Supreme Court's test for openness of judicial proceedings.

In its decisions establishing a public right of access to criminal court proceedings, the Supreme Court established two criteria.[46] First, the Court asked whether the requested right of access is rooted in judicial history. Second, the Court inquired whether access served important public interests, particularly whether it allowed the public to assess how well the judicial system functions.

Access to civil discovery documents meets both criteria, and therefore the public and press should have a First Amendment right to examine such material. Specifically, there is an historical right of access to documents disclosed in response to discovery requests, but not used in court proceedings. Further, denying the access to pretrial

discovery documents in public interest cases can prevent a determination whether the judicial system has been used to circumvent the public good.

Historical Access to Discovery Documents: Document discovery was developed in the English courts of common law as a supplementary means of trial preparation. Production of documents could be had "as early as the reign of Henry VI."[47] The British Judicature Acts of 1873 and 1875 reformed the discovery process, providing for interrogations, depositions and document production.[48]

The English court procedure permitting document discovery was adopted by numerous states in America, but no analogous federal court procedure existed until adoption of the Federal Rules of Civil Procedure in 1938.[49] Under many state rules, documents could be discovered only by court order. Similarly, the new federal Rule 34 permitted courts to "order any party to produce and permit the inspection and copying" of documents.[50] While Rule 34 did not require parties to file produced documents with the court, Rule 5(d) did state that papers served on parties had to be filed.[51] This includes both requests to produce discovery documents and the discovery materials themselves.

The Filing Requirement: The Supreme Court and certain other courts have indicated that neither a constitutional nor an absolute common law right allows access to documents filed in civil litigation.[52] Therefore, it may be difficult to argue for access to documents not formally filed with the court. However, first, under the federal rules all discovery documents either must be filed or are excused by the court from being filed. In either instance, they become court documents. Second, no court rejecting access has examined carefully the history, text and intent of the federal rules as applied to requests for access to pretrial discovery documents. The filing requirement in Federal Rules of Civil Procedure 5(d) makes clear that pretrial discovery documents are public

material to which access should be granted in the absence of a properly granted protective order. Rule 5(d) applies to discovery documents, as well as to pleadings.[53]

In adopting the original Rule 5(d), the Advisory Committee on Rules for Civil Procedure considered a proposal that would have kept litigation private, but instead ultimately selected language that permitted public access to discovery materials.[54] The Committee recommended that filing be required: "All papers after the complaint required to be served upon a party shall be filed with the court . . . ."[55] Papers filed with the court were considered to be public documents.[56]

Initially, it was not clear that document discovery was subject to the filing rule. In 1934, in amending Rule 34, which permits document discovery, the Advisory Committee stated that it intended to clarify that parties would have "the benefit of the applicable protective orders stated in rule 30(b) [now Rule 26(c)]."[57] Impliedly, this opened discovery documents to the public, since protective orders are issued only to keep confidential what otherwise is public.

In any case, an amendment to Rule 5(a) in 1970[58] left no doubt that the filing requirement applied to papers responsive to a document request, thus making those papers public documents. The Advisory Committee stated that the amendment "makes clear that all papers relating to discovery which are required to be served on any party must be served on all parties."[59] Rule 5(d) requires that all papers "to be served upon a party" must be filed with the court. Once filed, they become court documents, which presumptively are open to the public absent a "compelling need" for secrecy.[60]

Subdivision (d) was added to Rule 5 in 1980 specifically to protect the rights of nonparties to have access to "depositions . . . , interrogatories, requests for documents, requests for admission, and answers and responses thereto . . . ."[61] Initially, the Advisory Committee suggested that, due to storage costs, discovery materials not be filed unless so ordered by the court or for use in open proceedings.[62] Despite its recommendation that discovery materials normally not be filed, the Committee appended

a note making clear that nonparties still were to have access to the materials:

> This amendment and amendments to the discovery rules permit the materials described to be retained by the parties unless and until they are used for some purpose in the action. But any party may request that designated materials be filed, and the court may require filing on its own motion. It is intended that the court may order filing on its own motion at the request of a person who is not a party who desires access to public records, subject to the provision of Rule 26(c).[63]

However, following complaints by the press and others "about the 'unconscionable burden' of obliging them to secure a court order for access," the Advisory Committee instead recommended the current Rule 5(d).[64] The subsection now presumes that materials served on parties will be filed and open to the public. The Advisory Committee note to the 1980 amendment recognizes that sometimes no use is made of discovery materials, "[b]ut such materials are sometimes of interest to those who may have no access to them . . . such as members of a class, litigants similarly situated, or the public generally."[65]

Protective Orders: The Federal Rules of Civil Procedure recognize in yet another way the openness of the discovery process. The Rules provide for protecting discovery documents that otherwise would be public, not for making those public documents that otherwise would be secret.[66]

Protective orders forbidding access to or dissemination of discovery documents are to be issued only upon a showing of "good cause."[67] The burden is on the moving party to show that the order is necessary by demonstrating "a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements."[68] General objections to discovery requests are insufficient to support a protective order.[69] Without particularized claims of need, a court cannot properly evaluate whether a protective order should be issued.[70]

Further, courts must fully explicate their reasons for issuing protective orders and thereby denying public access to discovery documents. The failure "to state findings or

conclusions which justify nondisclosure to the public" is sufficient to void such an order.[71] The existence of "supervisory powers over its own records and files"[72] does not imply that . . . [a court] operates without standards."[73] Thus, sweeping protective orders issued without specific rationales are impermissible under the Federal Rules.[74] Courts should not allow the use of Rule 26(c) orders to avoid public access to documents.

The practice in England and America, and particularly the history of the adoption and amending of the Federal Rules of Civil Procedure show a pattern of intent to have pretrial discovery documents open to the public. This meets the first prong of the Supreme Court test for assessing the rights of access to court proceedings.

Public Interest: The second criterion in determining whether the press and public have access to judicial matters is the extent to which access would tend to operate as a curb on judicial misconduct and further the public's understanding of the judicial system.[75] Courts have recognized that public access promotes " . . . informed discussion of governmental affairs by providing the public with [a] more complete understanding of fairness" of the judicial system,[76] and "serves as a check on the integrity of the judicial process."[77] As a general proposition, access assures "that the courts are fairly run and judges are honest."[78] In the Globe decision, the Supreme Court stated that "[u]nderlying the First Amendment right of access to criminal trials is the common understanding that 'a major purpose of the Amendment was to protect the free discussion of governmental affairs.' "[79] Further, the Court said, "Whether the First Amendment right of access to criminal trials can be restricted . . . depends not on the historical openness of that type of criminal trial but rather on the state interests assertedly supporting the restrictions."[80] The Court, then, found that the public interest in access is more important than the historical tradition of openness.

The Court's statements regarding the public benefits of access to criminal proceedings are equally applicable to civil matters and to documents related to civil

proceedings. The public requires assurance that the judicial system is not being undermined by parties forcing others to reveal documents during discovery for nefarious purposes. Similarly, the public must know that settlements, particularly in cases involving questions of public concern, are not thwarting the public interest and that litigation is being decided fairly and accurately. Since the bulk of civil cases never go to trial, a public right of access limited to court proceedings and documents placed in evidence is meaningless.

The Oklahoma Publishing Company case is illustrative. There, under a pretrial settlement, a state agency paid to a group of hospitals $8 million more in Medicaid reimbursement than it had proposed paying before the hospitals brought suit. Additionally, reporters were led to believe that discovery documents might show that the Hospitals asked for Medicaid reimbursement for questionable overhead items.[81] The newspaper argued that if the press and public were not given access to the documents, the materials would be returned to the Hospitals or destroyed under terms of the protective order. The public, then, would be prevented from assessing the actions of public officials "by which millions of dollars in public funds [were] . . . paid to the Hospitals despite allegations of fraud . . . ."[82]

The newspaper claimed that the materials it sought included the underlying documentation of the costs claimed by the hospitals for reimbursement. It stated that the settlement used a formula different than that announced by the state agency for use with other claimants, thus imposing greater costs on the public. This gave the public a substantial interest in determining whether the claimed costs and the allegations of fraud were legitimate, according to the newspaper.[83]

The Tenth Circuit failed to reach the merits of the newspaper's public interest claims. The court found that the newspaper had no standing to request access. The court noted that the documents sought "had not been filed with the court and . . . were not available to the public generally . . . ."[84]

Taking another approach to denying access, the First Circuit recently argued that public access to the discovery process in civil proceedings would make discovery "more complicated and burdensome than it already is."[85] The court said that the public interest is in being assured that the process works; access would inhibit, not facilitate, discovery. Thus, the court rejected the suggestion that access to pretrial discovery documents would meet the second part of the Supreme Court's test.

Other courts have not found the public interest argument persuasive even in criminal cases. A federal grand jury returned a 45-count indictment against, among others, three county commissioners and various contractors and suppliers.[86] In part, the indictment alleged a pattern of bribery and corruption. Despite the obvious public interest in the prosecution, the Eleventh Circuit held that the press had no right of access to certain discovery documents, since they had not been filed with the court.

A very few courts, however, have held that in cases of public concern, the press and public should have access to pretrial discovery documents. In a divorce proceeding involving a man who was county treasurer and chairman of the county retirement board, the Massachusetts Supreme Judicial Court ruled that the public interest counterbalanced individual privacy interests.[87] The court ordered the release of, among other items, certain of the husband's financial statements which had been requested in discovery. The court held that where matters of public concern are involved, a higher standard than used in cases without public interest must be applied.

Similarly, a Parish Commission Council in Louisiana filed suit against the heirs of former parish officials for recovery of revenues allegedly unlawfully taken by the former officials.[88] The defendants requested a protective order, based on state law, prohibiting dissemination of all discovery information. The Times-Picayune Publishing Corporation intervened to oppose the request on grounds that it would prevent reporting on an important public issue. The Louisiana Supreme Court found that "the privacy interests of the individual defendants . . . which would permit them to seal from public view the

information sought in this litigation, are overwhelmed by the legitimate needs of the people to know the disposition of revenues from public lands."[89]

The Rhinehart Decision: Recently, courts refusing to grant access to pretrial discovery documents have relied on the Supreme Court's opinion in Seattle Times Co. v. Rhinehart.[90] Rhinehart arose from an action for defamation and invasion of privacy filed by the head of a "spiritualist church" and others against two newspaper publishers, including the Seattle Times Co., and several journalists. The newspapers had published several stories about Rhinehart and his Aquarian Foundation, describing seances Rhinehart conducted in which people paid him to put them in touch with deceased relatives and friends, magical "stones" that Rhinehart said were expelled from his body and which he sold, and Rhinehart's convictions, later vacated, for sodomy. Articles also reported on an "extravaganza" Rhinehart sponsored at the state penitentiary. The newspapers said 1,100 inmates saw a 6-hour show, during which Rhinehart gave away between $35,000 and $50,000 in cash and prizes. One article described a "chorus line" of women who sang at the prison show after shedding their gowns and bikinis.

The Seattle Times and other defendants sought certain documents and other information through discovery. Plaintiffs resisted and sought a protective order barring the defendant newspapers from publishing anything they might learn during the discovery process. Over the defendant newspapers' objections, the trial court issued a protective order prohibiting the Seattle Times and other defendants from publishing or making known to other news organizations any information learned through discovery.

In examining restraints on a party's freedom to disseminate discovery information, the Supreme Court applied a standard of review applicable to "incidental restrictions on First Amendment liberties . . . in furtherance of legitimate and substantial state interests other than suppression of expression."[91] The Court found that protective orders can prevent abuse of the pretrial discovery process. It stated that depositions and

interrogatories are not "a traditionally public source of information."[92] The Court said that "judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment to a far lesser extent than would restraints on dissemination of information in a different context."[93] Finding that the plaintiff made a proper "good cause" showing under the state rule analogous to federal Rule 26(c),[94] the Court upheld the trial court's issuance of a protective order.

However, Rhinehart is unique and factually inapplicable to most other civil litigation in which access to pretrial discovery documents is sought. First, it involved wholly private litigation. There were no issues in the case that had widespread public significance. This differentiates Rhinehart from many other instances in which the press requested access to pretrial documents, including cases involving payment of public monies,[95] alleged injuries to service personnel from the Armed Forces' use of the chemical "Agent Orange,"[96] charges that cigarette manufacturers distributed products dangerous to the public[97] and accusations that firms had contaminated a city's drinking water by discharging toxic chemicals into the ground.[98]

Second, defendants in Rhinehart were newspapers and reporters who were able to give widespread publicity to information learned through the compulsory discovery process as a possible means of harassing opponents in the litigation. The Court said that "the government clearly has a substantial interest in preventing this sort of abuse of its processes."[99]

Third, the moving party in Rhinehart submitted numerous affidavits and other documents establishing to the trial court's satisfaction that serious injury could result from publication of discovery materials.[100] In some other cases where the press has sought access, courts have not found "good cause" for issuance of protective orders.[101] The discovery documents in Rhinehart also implicated the constitutional rights of non-parties, including freedom of religion and association.[102] That situation does not pertain often in civil litigation, even in cases involving issues of public concern.

While Rhinehart is the Supreme Court's first discussion of pretrial discovery documents, it is not directly applicable to other decided cases in which the press, not as a party but as surrogate for the public, has sought access to such material. Rhinehart's guidance for those situations is in the Court's statements that the First Amendment must be considered when a court decides whether or not to prevent access.

First Amendment Considerations: Despite the view of at least one federal appellate court,[103] Rhinehart did not eliminate the First Amendment as a factor in determining whether the press and the public should be barred from access to pretrial discovery documents.[104] The Supreme Court did reject a view put forward by the District of Columbia Circuit that issuance of a protective order had to be judged by the same strict standard as a prior restraint.[105] Rather, the Court agreed with the First Circuit[106] that restrictions on use of discovery documents are subject to a lesser, but still measurable, degree of scrutiny under the First Amendment.[107] It stated that in deciding whether disclosure may be restricted, courts must determine

> whether the "practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression" and whether "the limitations on First Amendment freedoms [is] no greater than necessary or essential to the protection of the particular governmental interest involved."[108]

Thus, while the Court held that there is "no heightened First Amendment scrutiny" necessary for issuing a protective order,[109] the "good cause" requirement continues to necessiate consideration of the press' and public's First Amendment rights that could be impaired by such an order.[110] This is true even though an order "implicates the First Amendment right . . . to a far leser extent" than in other situations.[111]

Some courts have found a constitutional right of access to civil court records. In Wilson v. American Motors Corporation,[112] litigation was settled prior to a jury verdict and the record was sealed. At the request of a plaintiff in another case against American Motors, the Eleventh Circuit held that the trial judge abused his discretion by

ordering the sealing. The appellate court adopted a constitutionally-based standard, i.e., where denial of public access is needed "to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to that interest."[113]

In In re San Juan Star,[114] the First Circuit held that the First Amendment quaranteed public access to civil discovery documents. The court held that the trial court must look to the severity and imminence of the threatened harm, which must be clearly explicated.

Standing: In The Oklahoma Publishing Company case,[115] the Tenth Circuit utilized the test for standing set forth by the Supreme Court in Valley Forge Christian College v. Americans United for Separation of Church and State:[116]

> [A]t an irreducible minimum, Art. III [of the United States Constitution] requires the party who invokes court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putative illegal conduct of the defendant" and that the injury "fairly, can be traced to the challenged action" and "is likely to be redressed by a favorable decision."[117]

The appellate court found that the newspaper met the first part of the test, i.e., it would be injured, since the protective order prevented it from gaining access to and publishing information from the discovery documents. However, the court ruled that the newspaper failed to meet the second prong. That is, even if the order had been removed, the trial court had no power to force either party to the underlying litigation to allow access to the documents.[118] This approach also was taken by the Michigan Court of Appeals in denying access to media seeking discovery materials in litigation involving construction of a nuclear power plant.[119]

These two decisions stand alone. In other cases in which the media have intervened as third parties to seek access to pretrial discovery documents, courts have not

questioned the media's right to do so.[120] Whether or not the media's requests were granted, courts recognized that they had standing to seek access.

CONCLUSION

Most courts have rejected requests to permit the public and press access to pretrial discovery documents not used before the court. Frequently, such decisions claim that no historical basis exists for access, or that the public interest does not justify access. Other courts cite the Rhinehart decision as precluding the opening of discovery documents.

To the contrary, a close look at the adoption and amending of the Federal Rules of Civil Procedure and an understanding of the Supreme Court's rationale for permitting access to criminal proceedings shows that there is a strong justification for allowing access to pretrial discovery documents in civil litigation involving questions of public concern. Further, Rhinehart is inapplicable to most cases in which access has been sought. Its application to those cases is only, but importantly, in its pronouncements that First Amendment values are at stake.

A few courts have recognized that the public interest demands access in certain cases. The conclusions drawn by these courts should be adopted widely. Continued secrecy prevents the press and public from learning about matters which may be of the utmost public importance.

FOOTNOTES

1 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

2 Waller v. Georgia, 467 U.S. 39 (1984).

3 Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984).

4 See, e.g., Publicker Industries v. Cohen, 733 F.2d 1059 (3d Cir. 1984); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983), cert. denied, 465 U.S. 1100 (1984).

5 See, e.g., Anderson v. Cryovac Inc., 805 F.2d 1 (1st Cir. 1986); Cipollone v. Liggett Group, Inc., 785 F.2d 1108 (3d Cir. 1986).

6 " 'Whether speech addresses a matter of public concern must be determined by [the expression's] content, form and context . . . as revealed by the whole record.' " Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. 472 U.S. 749, 761 (1985), quoting Connick v. Myers, 461 U.S. 138, 147-48 (1983).

7 The majority of state rules of civil procedure are based on, or track directly, the Federal Rules of Civil Procedure. See, e.g., Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984).

8 Fed. R. Civ. P. 26(b)(1).

9 Id. at 30, 31.

10 Id. at 33.

11 Id. at 34.

12 See supra note 6.

13 Fed. R. Civ. P. 34(a).

14 Id. at 34(b). The responding party has 45 days if the request is served with the summons and complaint. Id.

15 Id.

16 Id. at 26(c).

17 Id.

18 See, e.g., Seattle Times Co. v. Rhinehart, 467 U.S. 20.

19 See, e.g., Oklahoma Hospital Association v. The Oklahoma Publishing Company, 748 F.2d 1421 (10th Cir. 1984).

20 See, e.g., Joy v. North, 692 F.2d 880 (2d Cir. 1982), cert. denied, 460 U.S. 101 (1983).

21 748 F.2d 1421.

22 Brief for Appellant, at 3, id.

23 748 F.2d at 1425.

24 467 U.S. 20.

25 748 F.2d at 1425.

26 Id.

27 13 Med. L. Rptr. 1721.

28 Additionally, the order permitted one media outlet, public television station WGBH, to have access to discovery information. The appellate court found selective access to be impermissible. Id. at 1727.

29 Id.

30 Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

31 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555.

32 Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

33 Id. at 608-10.

34 Press-Enterprise Co. v. Superior Court, 464 U.S. at 510.

35 Waller v. Georgia, 467 U.S. 39.

36 Press-Enterprise Co. v. Superior Court, 106 S. Ct. 2735 (1986).

37 705 F.2d 1143 (9th Cir. 1983).

38 See, e.g., In re Continental Illinois Securities Litigation, 732 F.2d 1302 (7th Cir. 1984); In re The Iowa Freedom of Information Council, 724 F.2d 658 (6th Cir. 1983); Newman v. Graddick, 696 F.2d 796 (11th Cir. 1982).

39 Lower courts finding a constitutional right of access to civil proceedings have relied on the Supreme Court's reasoning in its criminal trial access decisions. See, e.g., cases cited supra note 38.

40 Publicker Industries v. Cohen, 733 F.2d at 1069.

41 In re San Juan Star, 662 F.2d 108 (1st Cir. 1981).

42 Joy v. North, 692 F.2d at 893.

43 Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d at 1177.

44 In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 101 F.R.D. 34, 42 (C.D. Cal. 1984).

45 American Telephone & Telegraph Co. v. Grady, 594 F.2d 594, 596 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1979).

46 See Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 564-80; Gannett Co. v. DePasquale, 443 U.S. at 378-93.

47 G. Ragland, Discovery before Trial 11 (1932); id. at 12 (quoting I Spence's Equitable Jurisdiction 677).

48 Id. at 18.

49 Pike & Willis, The New Federal Deposition-Discovery Procedure: II, 38 Colum. L. Rev. 1436, 1456 (1938).

50 Fed. R. Civ. P. 34 (1938).

51 Id. at 5(d).

52 See, e.g., Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-98 (1978); In re The Reporters Committee for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985). But see In re Continental Illinois Securities Litigation, 732 F.2d at 1314 (presumptive right of contemporaneous access attaches before trial); Joy v. North, 692 F.2d at 893 (finding a post-summary judgment right of access).

53 "All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding." Fed. R. Civ. P. 5(d).

54 See Brief of Amicus Curiae The Reporters Committee for Freedom of the Press at 27-29, Anderson v. Cryovac Inc., 805 F.2d 1.

55 Fed. R. Civ. P. 5(d) (1938).

56 See J. Hopkins, The New Federal Equity Rules 264 (1933).

57 Fed. R. Civ. P. 34 advisory committee note.

58 "Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4." Fed. R. Civ. P. 5(a).

59 Fed. R. Civ. P. 5 advisory committee note.

60 Globe Newspapers v. Superior Court, 457 U.S. at 606-07.

61 Fed. R. Civ. P. 5(d).

62 Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 622-23 (1978).

63 Id.

64 Amendments to Rules, 85 F.R.D. 521, 540 (1980).

65 Fed. R. Civ. P. 5 advisory committee note (emphasis added).

66 Id. at 26(a).

67 Id. at 26(c).

68 United States v. Garrett, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978).

69 See, e.g., General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204 (8th Cir. 1973), cert. denied, 414 U.S. 1162 (1974); White v. Wirtz, 402 F.2d 145 (10th Cir. 1968); United States v. Hooker Chemicals & Plastics Corp., 90 F.R.D. 421, 425 (W.D.N.Y. 1981).

70 United States v. Hooker Chemicals & Plastics Corp., 90 F.R.D. at 425; see also Schlagenhauf v. Holder, 379 U.S. 104, 118 (1964).

71 Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d at 1176.

72 Nixon v. Warner Communications, 435 U.S. at 598.

73 Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d at 1176.

74 See id.

75 See Press-Enterprise Co. v. Superior Court, 464 U.S. at 508-10; Globe Newspapers v. Superior Court, 457 U.S. at 606; Richmond Newspapers v. Virginia, 448 U.S. at 569-73.

76 United States v. Smith, 787 F.2d 111, 114 (3d Cir. 1986).

77 Bank of America v. Hotel Rittenhouse Associates, 800 F.2d 339, 345 (3d Cir. 1986).

78 Crystal Grower's Corp. v. Dennis, 616 F.2d 458, 461 (10th Cir. 1980).

79 Globe Newspapers v. Superior Court, 457 U.S. at 604 (citations omitted).

80 Id. at 605 n.13.

81 Brief for Appellant at 3, Oklahoma Hospital Association v. The Oklahoma Publishing Company, 748 F.2d 1421.

82 Id. at 5.

83 Id. at 5-6.

84 748 F.2d at 1425; see also Booth Newspapers v. Midland Circuit Judge, 145 Mich. App. 396, 377 N.W.2d 868 (1985), cert. denied, 107 S. Ct. 877 (1987).

85 Anderson v. Cryovac Inc., 805 F.2d at 7.

86 United States v. Anderson, 799 F.2d 1438 (11th Cir. 1986), cert. denied, 107 S. Ct. 1567 (1987).

87 Prescott Publishing Co. v. Norfolk County, 395 Mass. 274, 479 N.E.2d 658 (1985).

88 Plaquemines Parish Commission Council v. Delta Development Co., 472 So. 2d 560 (La. 1985).

89 Id. at 568.

90 467 U.S. 20.

91 Procunier v. Martinez, 416 U.S. 396, 413 (1974).

92 Id. at 32.

93 Id. at 34.

94 Fed. R. Civ. P. 26(c); see supra text accompanying notes 61-74.

95 Oklahoma Hospital Association v. The Oklahoma Publishing Company, 748 F.2d 1421.

96 In re "Agent Orange" Product Liability Litigation, 96 F.R.D. 582 (E.D.N.Y. 1983).

97 Cipollone v. Liggett Group, Inc., 785 F.2d 1108.

98 Anderson v. Cryovac Inc., 805 F.2d 1.

99 Seattle Times Co. v. Rhinehart, 467 U.S. at 35.

100 Plaintiffs in Rhinehart argued that the articles published in defendant newspapers had prompted numerous threats and physical and verbal abuse against the church leader, the church and its members. Id. at 26-27.

101 See, e.g., Plaquemines Parish Commission Council v. Delta Development Co., 472 So. 2d 560.

102 467 U.S. at 26-27, 36-37.

103 Cipollone v. Liggett Group, Inc., 785 F.2d at 1119-20.

104 See Anderson v. Cryovac, Inc., 805 F.2d at 8.

105 In re Halkin, 598 F.2d 176, 183-84 (D.C. Cir. 1979); see Seattle Times Co. v. Rhinehart, 467 U.S. at 25 n.6, 33.

106 In re San Juan Star, 662 F.2d 108.

107 467 U.S. at 32, 34.

108 Id. at 32 (citations omitted).

109 Id. at 36.

110 Id. at 37 (Brennan & Marshall, JJ., concurring).

111 Id. at 34.

112 759 F.2d 1568 (11th Cir. 1985).

113 Id. at 1571.

114 662 F.2d 108.

115 748 F.2d 1421.

116 454 U.S. 464 (1982).

117 Id. at 472 (citations omitted).

118 The newspaper informed the court that the state agency "stated it immediately would make available" to the newspaper the discovery documents. Brief for Appellant at 4, id.

119 Booth Newspapers v. Midland Circuit Judge, 145 Mich. App. 396, 377 N.W.2d 868.

120 See, e.g., In re Knoxville News-Sentinel Co., 723 F.2d 470 (6th Cir. 1983); Associated Press v. United States District Court, 705 F.2d 1143 (9th Cir. 1983); In re San Juan Star Co., 662 F.2d 108; In re "Agent Orange" Product Liability Litigation, 96 F.R.D. 582; In re American Broadcasting Companies, 537 F. Supp. 1168 (D.D.C. 1982).